88-563

Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

Term, October 1988

ARNOLD W. KRAMER,
Petitioner

v.

DEPARTMENT OF COMMERCE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Arnold W. Kramer
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QUESTIONS PRESENTED

Can the falsification of government records be utilized to force a government employee to work uncompensated overtime?

Can the Privacy Act be utilized to conceal such falsification of government records in forcing a government employee to work such uncompensated overtime?

Can an employee of the federal government be forced to work 20 hours per week of uncompensated overtime week in and week out for 16 years in order to retain his job, with the necessitation of such uncompensated overtime being dependent upon the falsification of government records and with the concealment of such falsification being in the guise of the Privacy Act?

LIST OF PARTIES

ARNOLD W. KRAMER,
Petitioner

v.

DEPARTMENT OF COMMERCE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Arnold W. Kramer respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this matter on June 13, 1988.

OPINIONS BELOW

The June 13, 1988 Decision and Opinion of the United States Court of Appeals for the Federal Circuit is unpublished and appears in the Appendix at A-1-A-3.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1988, and a petition was filed within 90 days of that date. With a 21 day extension of time granted on September 12, 1988, for filing an amended petition this petition was filed within 21 days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

5 U.S.C. §2301 reads in relevant parts as follows:

> "(b)(2) All employees and applicants for employment should receive fair and equitable treatment in all respects of personnel management
>
> "(3) Equal pay should be provided for work of equal value

"(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believes evidences–

"(A) a violation of any law, rule, or regulation, or

"(B) mismanagement, a gross waste of funds, an abuse of authority."

18§ 2073 reads in relevant parts as follows:

"False entries and reports of moneys or securities.

"Whomever, being an officer, clerk, agent or other employee of the United States or any of its agencies, charged with the duty of keeping accounts or records of any kind, with intent to deceive, mislead, injure, or defraud, makes in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties; or...

"Shall be fined not more than $5,000 or imprisoned not more than ten years, or both (June 25, 1984. c. 645, 62 Stat. 795.)"

STATEMENT OF THE CASE

This case presents important issues for all governmental employees as to whether employment discrimination against an individual employee can be tolerated based upon falsification of his individual record as compared to the rest of the employees with such falsification being hidden from view under the guise of the Privacy Act.

Petitioner Arnold W. Kramer (Kramer) was a patent examiner who was removed by the Department of Commerce (Agency) for unacceptable performance.

Performance is based upon the agency established formula whereby an examiner's production goal is dependent upon his grade and the complexity of the art he works on. Kramer was a GS-12 with a complexity factor of 1.3 which was the highest complexity in his Art Unit. It was obtained for him by Anton Oechsle who was a primary examiner in Kramer's Art Unit and who helped train Kramer and to whom Kramer reported cases and whose name appears as the issuing authority with Kramer's on the issued patents.[1]

---

[1]See Appendix "C" Item 1 (excerpt of trial transcript before the Merit System Protection Board).

Due to the falsification of Kramer's records he was forced to work 20 hours of overtime per week to meet his falsified production quota.[2]

That Kramer's record was falsified can be seen by Exhibit C (presented to the Merit Systems Protection Board and the Court of Appeals) which lists Kramer's production goal as 15.4 hours per balanced disposal when it should have been at least 21.5. This Exhibit C shows that when Kramer's record was falsified and he would not sign it, his supervisor, R. C. Pinkham, actually had another supervisor, Gene Mancene, witness that Kramer would not sign it, whereupon Kramer had two other examiners, namely George J. Marlo and Leo P. Picard, of his Art Unit also witness that he would not sign. This is a falsification of government records and violates 18 §2073.

That Kramer had a 1.3 complexity factor; that the record was falsified, necessitating his working 20 hours of uncompensated overtime week in and week out for 16 years; and that such was hidden from view can be seen by the following Exhibit R which was given to the agency before Kramer's discharge; was given to the Merit System's Protection Board Judge Lanphear; and given to the Court of Appeals (as Exhibit 4).

---

[2]See Appendix "C" Item 2.

"George B. Driesen, P.C.
Attorney At Law
Suite 204
1000 Potomac Street, N.W.
Washington, D.C. 20007
Telephone: (202338-5754

"October 21, 1986
"HAND DELIVERED

"Mr. Rene Tegtmeyer
Assistant Commissioner for Patents
Crystal Plaza, Room 11A13
Washington, D.C.

"Dear Mr. Tegtmeyer:

This letter is submitted in response to the Notice of Removal served upon Arnold W. Kramer, a veteran of twenty-two years of exemplary service to the Patent Office. Mr. Kramer's removal is proposed because he failed to meet the production standard assigned to him and because he has reached retirement age. As we shall explain in detail below, the production standard set for Mr. Kramer was established arbitrarily and capriciously and is based on the assumption that an examiner will work sixty or more hours per week in order to meet the standard. Since the normal work week established by law for federal employees is forty hours per week, the standard is unlawful. Mr. Kramer's failure to meet the standard reflects the fact that he is no longer willing to work sixty hours per week to meet

a standard which is arbitrary, capricious and unlawful. And, of course, the removal, based as it is on Mr. Kramer's age, cannot stand in any event. See 29 U.S.C.A. §633a, et seq (requiring that "all personnel actions affecting employees ... in executive agencies ... shall be made free from any discrimination based on age.")[1] We discuss these matters below.

1. MR. KRAMER'S REDUCED PRODUCTION IS NOT THE RESULT OF DEFIANCE

At the outset, we wish to set the record straight on the question of Mr. Kramer's alleged defiant attitude. It grossly mischaracterizes Mr. Kramer's position to assert that his reduced production is the result of the calculated defiance. On the contrary, it is the result of Mr. Kramer's decision no longer to work the sixty hours per week that he has been working for many years, but to work the forty hours per week that the law and your method of measuring performance (see the calculation of hours per balanced disposal in a given period) contemplated employees will ordinarily work. The simple fact is that the productivity goal established for the art to which he (and no one else) is assigned is unfair, arbitrary and capricious, as we show below. It is, to put it succinctly, too high and does not reflect the complexity of his art. The goal set is beyond the reach of a competent GS-12 examiner during a normal work week, i.e., forty hours per week.

It is not a willful refusal to produce what he is capable of producing that has resulted in the decline in Mr. Kramer's performance. Rather, that reduced production is the result of Mr. Kramer's working diligently, but only during the statutorily established work week of forty hours.

Contrary to your letter, Mr. Kramer did not tell his supervisor that he would only perform at 67% of the goal set by the Office. Rather, Mr. Kramer told Mr. Hafer that if he worked only forty hours per week, he could not achieve more than that. He said this as part of a discussion of his contention that the goal set for his art was unrealistic. We now show that it is.

2. THE PRODUCTION STANDARD IMPOSED UPON MR. KRAMER IS ARBITRARY, CAPRICIOUS, AND UNLAWFUL

A. The method used to establish Mr. Kramer's Performance Standard will not withstand scrutiny.

The production standard established by the Office for Mr. Kramer was set, according to a Memorandum of Robert A. Hafer dated January 29, 1986, by one Gerald Forlenza as a result of certain overall understandings reached between POPA and the Commissioner. The original numerical goals, set by negotiations, were not, it appears, based upon any objective measurements of any examiner's performance.

Nor was the goal for Mr. Kramer's art at that time set by any other objective measurement. While the Office seems to concede that a "complexity factor" has been assigned to Mr. Kramer's art, no objective measure of "complexity was ever established, and no attempt to relate to the complexity conclusion to any objective, stated facts were made. To put it mildly, the system is at best subjective. No scientific or other empirical evidence supports it. Most important for our purpose, no objective basis for arriving at Mr. Kramer's initial goal was ever developed. Without such an objective foundation, the production standard will surely be held by an impartial tribunal to be arbitrary and capricious.

B. The application of the System Performance Standards to Class 272 was arbitrary and capricious.

Aside from the fundamental defect in the Office's method of establishing performance standards, the specific application of the standards to Mr. Kramer's art was plainly arbitrary. We are told that Mr. Forlenza assigned the H/BD goal for Mr. Kramer's art. We are not told how he arrived at those numbers, and at least as to the goal for class 272, the H/BD of 15.2 was clearly inconsistent with Mr. Kramer's supervisor's assessment of the relative difficulty of his art, as Mr. Kramer has already pointed out. For, at the time, his supervisor believed the complexity factor for Mr. Kramer's art was 1.2.[2] Assum-

ing that that assessment was correct, Mr. Kramer should have had a production goal of 21.5. That contention is unanswerable. For it is the result of a simple mathematical computation, applying the relative complexity within Mr. Kramer's then art unit 334 to the H/BD then assigned to that unit overall (17.94). Since the Office cannot and does not dispute the relative complexity figure Mr. Pinkham gave to Mr. Kramer's docket, within art Unit 334 (a fact not changed by the POPA Agreement) and does not dispute the arithmetic calculation upon which we rely, it cannot dispute the conclusion which we draw from the admitted facts.

The accuracy of our position is established by what happened some years thereafter in 1981 and 1982 when the Office hired Mr. Leo Picard and Maryann Lestova and assigned them to Art Unit 334. After they were trained, some of Mr. Kramer's docket and a portion of the docket of other examiners in art Unit 334 was assigned to the two new employees. In recognition of the complexity of art Mr. Kramer had been examining, that portion which was taken from him was assigned a very high complexity rating, resulting in goals of 25.7 and 23.6 hours per balanced disposal being set for the two new employees. Using the 17.94 average for the unit as a base, one can see that the Office believed that complexity factors of 1.4 and 1.35 were appropriate for class 273 and 272, respectively. Yet, when Mr. Kramer had those classes, his goal was 18.0

hours per balanced disposal, indicating a complexity factor of 1.0 using the 1976 art unit norm of 17.94. No reason for this disparity of treatment within art Unit 334 is proffered.

The felony was compounded when Mr. Kramer's H/BD was reduced from 18.0 to 15.6 ostensibly because the docket assigned away from him in 1981 and 1982 and to the two new employees was more complex than the remainder of Mr. Kramer's docket. But that assertion cannot be squared with the fact that Mr. Kramer's H/BD was the only one in the same Art Unit that was reduced. Mr. Kramer had virtually the most complex art in the unit at the time. Logically, of course, if the portions of Mr. Kramer's docket assigned to the new employees were more complex than the rest of his docket (which is inconsistent with the high complexity factor assigned to his overall docket), the same must have been true of the other employees' dockets. Yet their H/BD's were not altered. And it is that same 15.6 H/BD that is carried forward to this day and gives rise to the present proceedings. Mr. Kramer, we reiterate, has met that goal only by working sixty hours per week. It is not now and never was anything but an arbitrary and capricious goal. Its unrealism, coupled with Mr. Kramer's refusal any longer to work uncompensated overtime to achieve it have led to the Notice you have issued.

3. THE ORIGINAL PERFORMANCE GOALS SET

FOR CLASS 272 WERE BASED ON THE PRODUCTION OF EXAMINERS WHO WORKED 58-60 HOURS OF UNCOMPENSATED OVERTIME

Thus far, we have looked at the action taken with respect to Mr. Kramer from the standpoint of consistency within the Performance Standard System the Office has established. We believe we have shown that the inconsistencies set out above preclude a successful defense of the contemplated action before the MSPB and the courts. But the question remains whether, even if the internal inconsistencies we have shown were somehow overcome, the Office could show that the performance goal it has set for Mr. Kramer's art (Class 272) is based upon some empirical observations. As we pointed out above, we have not been advised that any such observations were ever made, let alone when and by whom.

We believe that if the H/BD has any basis at all, it had to be based upon the number of hours per balanced disposal which he and one William Browne, working on the same art achieved in the 1970's when they were assigned to Mr. Pinkham's Art Unit. When those presumed performance measurements were made, Mr. Kramer attests, and Mr. Browne will confirm, both he and Mr. Kramer were consistently and regularly working substantially more than the forty hours which is the statutory work week for government employees. See 5

U.S.C.A. §6101(a)(2)(1980); id. (Supp. 1986). Mr. Kramer was working at least sixty hours per week, every week, and Mr. Browne was working at least fifty-five hours per week, week in and week out. The Office was well aware of that fact at the time, and has been aware of it throughout the disciplinary proceedings which have culminated in the instant Removal Notice. If there was any basis to the H/BD goal established in 1976 for Class 272, it had to be derived, as the Office well knows, by dividing the number of balanced disposals completed by Mr. Kramer and Mr. Browne by the number of regular hours of work in the test period to arrive at a production goal that sets a number of hours required per balanced disposal. Deriving a standard in the manner described necessarily made the standard so unrealistically high as to make it arbitrary and capricious for an employee working the normal work week. Nevertheless, the Office has left the standard in place with respect to Mr. Kramer. The Notice therefore, is based on an unlawful performance standard.

We are aware, of course, of the Office position that it negotiated the performance standards with POPA, the employees' collective bargaining representative. But the statute obligating federal agencies to establish performance standards does not permit the imposition of standards that are arbitrary and capricious, i.e., that lack an empirical foundation, as the MSPB has held so frequently that no citation is required to establish the point. That a

performance standard has been agreed upon in collective bargaining is no defense to a violation of the underlying statute, as I am sure you are aware. Nor, of course, was the production standard for Class 272, the one at issue here, negotiated; it was set unilaterally by the Office. Hence, it should be apparent to you that the position the Office has taken in proposing to discharge Mr. Kramer in reliance upon its negotiated agreement with POPA cannot be sustained on appeal, as it will have to be if we are unable to resolve the matter at this stage.

4. THE CONTEMPLATED ACTION WOULD CONSTITUTE DISCRIMINATION BASED UPON AGE AND THEREFORE CANNOT STAND

Finally, if the Office takes the action set out in the Notice, it would clearly run afoul of the statute forbidding Age Discrimination in Employment. For the Notice states that the Office has "...also considered that...you reached eligibility for retirement in January, 1986" when Mr. Kramer received his Warning Letter. Mr. Kramer's eligibility for retirement is a function of his age, of course. By considering that factor in its determination to discharge him, the Office has admitted that it based the proposed action in significant part on Mr. Kramer's age. No citation of authority is required to demonstrate that that is impermissible.

CONCLUSION

For the reasons stated above, we respectfully request that the Proposed Notice of Intent to Remove be withdrawn.

Respectfully submitted,

/s/ George G. Driesen
George G. Driesen
Counsel for Arnold Kramer

FOOTNOTES

[1] Mr. Kramer is aware that to redress this violation he must file an appropriate charge. But he prefers to resolve the matter by this response, if possible.

[2] In fact, as we shall show should this matter go to hearing, the complexity factor was 1.3, but it was reduced for no apparent reason to 1.2."

Kramer believed it was utterly futile to go to higher authority in the Patent Office because as can be seen from pages 12-16 of Exhibit S[3] which was given to Assistant Commissioner for Patents Rene Tegtmeyer before Kramer's firing;

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[3]See Appendix "C" Item 3.

given to Judge Lanphear of the MSPB; is the verbatim sworn testimony of Kramer on pages 63-67 of the trial testimony; and was presented to the Circuit Court.

REASONS FOR GRANTING THE WRIT

I. **Rene Tegtmeyer should not have been the agency's investigator because he was a party to the problem and effectively trying himself and *Williams v. Rubicoff* notes:**

When administrative officer is sitting in dual role as judge of law and trier of facts, and when he, as judge, gives himself, as fact-finder, incorrect instruction as to law governing decision he must make, error is committed just as there is error if judge incorrectly charges jury. *Williams v. Rubicoff,* C.A.Miss. 1963 323 F.2d 231.

II. **There should be a substitution of the Court's judgment for the agencies according to *Grassetti v. Weinberger.***

When plaintiff charges that defendant agencies actions constituted certain violations of law, reviewing court could take cognizance and substitute its own judicial judgment as to what law is and whether a violation had occurred. *Grassetti v. Weinberger,* D.C.Cal. 1976, 408 F. Supp. 142.

III. **Richard Pinkham, in ordering petitioner not to put Saturday and Sunday uncompensated overtime on the signin sheets and falsifying petitioner's production goal record was willfulness in *U.S. v. Simpson*.**

Under this section, statutory requirement of willfulness is satisfied if accused acted intentionally with knowledge that he was breaching the statute. *U.S. v. Simpson*, C.A.Cal. 1972, 460 F.2d 515.

IV. **The agency, by failing to keep proper records on petitioner is in violation of 5 §552a.**

> "(g)(1) Civil remedies – Whenever any agency...
>
> "(c) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual...the individual may bring a civil action against the agency, and the district courts of

the United States shall have jurisdiction in the matters under the provisions of this subsection."

V. The Court of Appeals itself has so far departed from the accepted and usual course of judicial proceedings so as to sanction such departure by the Merit Systems Protection Board.

Judge Lanphear tolerated the following governmental misconduct as pointed out in petitioner's "Informal Brief" to the Court of Appeals in Exhibit 3A:

> "Furthermore, the following governmental misconduct took place. The original investigation was flawed: Original charges dropped; changed charges when position was untenable; commissioner failed to properly investigate; Don Pearson, the attorney, misrepresented facts to administrative Judge on witnesses; list of witnesses not given until actually in court room; could not make a complete opening statement; could not testify without resorting to recuse; could not introduce secondary evidence to show Don Pearson misrepresented facts as to witness list, and that he and the commissioner used same tactics to fire one of the witnesses and that presiding officials in hearings on that previous case concerning witness did not believe testimony of commissioner and Don Pearson and ruled in witness'

favor. This was the same approach they switched to in my case when they realized that their original charge would not stick; asked for review but MSPB just passed the issue to Circuit Court rather than reviewing and handing down a decision themselves; failed to invoke rule that they must rule in my favor according to statutes and just sent case to Circuit Court; and agency was not timely in filing the certified list with the United States Court of Appeals for the Federal Circuit. Filed beyond the 40 day limit with no explanation given." [In addition they totally disregarded the government falsifying the records and keeping it hidden under the Privacy Act.]

Judge Lanphear observed that "The appellant presented the testimony of another Patent Examiner who had worked with appellant before the creation of Art Unit 331. At that time, appellant worked on classes 272 and 273. The witness testified that he considered those patents complex. The appellant also presented the testimony of a further examiner, whose art is office machines, that he finds the agency system unfair and that he does not believe that the complexity of his art is properly recognized. The appellant also wanted to present the testimony of more coworkers who would testify that they were unfairly treated by the agency or who would testify about appellant's problems

with the supervisor he had prior to Mr. Hafer. Those witnesses would have duplicated the appellant's own credible testimony that in the 1970's when the standards were determined and thereafter, he routinely worked sixty hours per week."

Judge Lanphear is confused. While she notes that "The appellant presented the testimony of another patent examiner who had worked with the appellant before the creation of Art Unit 331" she totally missed the point that this is the testimony of the man to whom I reported cases, who helped to train me, and who was the instrumentality of my being given the highest complexity in my Art Unit, which complexity was 1.3. If I have a 1.3 complexity, I cannot have merely the 15.4 hours per disposal that Mr. Pinkham falsified my records with. Furthermore, this witness did not testify that he considered those patents complex. He already knows that they are complex with a complexity of 1.3 which he was instrumental in my getting. His name (Anton Oechsle) as well as mine are on these patents. It was the further patent examiner who corroborated that those patents were complex. While the agency argued that there was a method of changing a class average, this further examiner testified that:

> "I do have a complex art, and I have a — I work in typewriters. Your basic office machine, you're talking about 3,000 elements to begin with. I know what a complex art is. I know

what a search is. And I know that my own goal is not adequate. I also have to work VOT in order to make my own goal. I just came off a 90-day oral warning. I don't agree with it. I don't like it. And in terms of something that Mr. Tegtmeyer said earlier about — I don't know whether it was Mr. Tegtmeyer or Kramer's SPE — about there being a procedure to get the goals changed if they are wrong. I have been trying to get my goal changed since 1974; I have not yet been successful. The procedure's there on paper. It's another matter to get the management to take a good hard look at what the evidence is and do something about it. I think these cases are complex." See Page 120, 121 of Merit Systems Protection Board, April 24, 1987 (Exhibit Z)

It should be kept in mind that at least he has his complexity factor and even though it isn't enough and he can't get it changed, this is not petitioner Kramer's problem. Kramer's problem is that he has a complexity factor and is being cheated out of it by the falsification of his records. He doesn't need a class of art changed, he just needs the falsification of his records corrected so as to be in line with his established complexity factor.

This other examiner (Wright) with the complex art was given Browne's (who worked

under Pinkham and was prevented from testifying but worked 55 hours per week) cases to review when Browne was up for promotion. He found no substantive errors and so reported it, and Browne should have been promoted. Browne not only wasn't promoted but was even denied a superior performance award by Mr. Pinkham which is automatically given for 110 percent of production. Mr. Pinkham is the same supervisor who falsified Kramer's records and forced Kramer and Browne to work 20 and 15 hours of uncompensated overtime, week in and week out, and the reason Pinkham gave for not giving Browne his superior performance award when he produced 126 percent was that HE WAS OBSERVED WORKING OVERTIME.

The further witnesses were to corroborate Kramer's complexity and falsification of records. This has nothing to do with appellant's "problem with the supervisor," rather it would have corroborated the falsification of records and the utilization of the Privacy Act to keep it hidden.

The statement that "these witnesses would have duplicated appellant's own credible testimony that in the 1970's when the standards were determined and thereafter, he routinely worked sixty hours per week" totally missed the point. These witnesses would have testified that Kramer's complexity was the highest in the art unit and they are dumfounded to learn that Pinkham has it listed as 15.4 hours. Due to the Privacy Act one examiner doesn't know what another examiner's goal is. This is explained on

pages 16-18 of Exhibit S and on pages 67-68 of the trial transcript as quoted below:

> "One of the basic causes of the above problem appears to be that examiners are not routinely informed of their individual group's complexity factor as pertains to the other groups, nor to the average of a GS-12, etc. whether officewise, or in their particular group. Basically, they are merely assigned a goal by their supervisor which goal cannot even be compared to others working in the same art due to the Privacy Act. In other words during the whole time of working 60 hours per week, I was never informed, nor was it available to me, what other examiner's assigned goals were. Although it would appear that each group's complexity factor and the average GS-12 goal in that group should be available to all examiners together with the GS-12 goal for any particular art in that group, such is not the case. In other words, the GS-12 quota assigned to one examiner, is not available to be seen by another examiner even though the other examiner is working in the same class of art. Two examiners working in the same class can both have different GS-12 goals or quotas assigned to them and one does not know what the other is. This basically was the

problem in my case. While I had the highest complexity factor in Pinkham's art unit, as can be seen from the above I did not have the GS-12 H/BD that such complexity called for and was beaten out of an average of 9 H/BD as seen by the above facts. It was only when I made written inquiry as to what my goals were and how they were derived after I had been given the 90-day oral warning letter that any information was even developed as to what pertained to me, let alone any other examiners. I had to approach Leo Picard and ask him to actually find out his H/BD although he was one of the ones hired and assigned his goal by Pinkham when I had the highest complexity factor in Pinkham's art unit. Another problem appears to be that the art assigned to me in Pinkham's art unit in 272 and 273 subclasses 138-147 was put together and assigned to me and for years I was the only one working on that particular art. In other words there was no comparison with anyone else because I was the only one working on my given subclasses in those classes. It was I who basically determined the goals for those subclasses by working 60 hours per week. As it turned out, while I was assigned the highest complexity in Pinkham's art unit, I did not get the H/BD or hours

per balanced disposals commensurate with this complexity."

Finally, concerning the June 13, 1988, Decision of the United States Court of Appeals for the Federal Circuit, it was their opinion that "Kramer argues that the administrative judge (AJ) erred in not permitting all of his witnesses to testify. However, Kramer has not shown that those witnesses who were excluded by the AJ would provide testimony on the issue of Kramer's unsatisfactory performance, which testimony would not duplicate the testimony already before the board. Kramer has not shown an abuse of discretion by the AJ in excluding his witnesses."

Petitioner Kramer's response to the above is that this is not so. The testimony of William R. Browne would have shown where Kramer's exceedingly high goal came from and was arrived at, it being noted that while Kramer was working 60 hours per week that Browne was working 55 hours. This was at a time when the Patent Office ran an observation on how much each examiner was producing. At the time, Kramer had a 1.3 complexity factor which was highest in his art unit and due to conscientiousness was working the 60 hours to help reduce the backlog of pending cases which the commissioner requested. To then trap Kramer and Browne by merely noting how many cases they produced and then saying that this was a normal 40 hour work week production resulted in this whole problem. The law requires that a government employee work a 40 hour work week. Kramer was then

not only handicapped with a 20 hour per week handicap, but was at the same time cheated out of his 1.3 complexity. As can be seen by the record, Kramer's complexity factor even today is 1.2 and must result in this 1.2 being multiplied by the standard of a GS-12 with a complexity of 1 to arrive at Kramer's true goal. Where everyone is missing the boat is to just say Kramer's goal is 15 hours. This is a falsification of the record. The Office cannot show where this came from. Kramer's real goal as calculated by the formula is at least 22 hours per case and not 15. This is Kramer's true goal. The fact that the Office just lists his goal as 15 and expects him to meet it is unlawful and against any and all reason. You just don't say this is your goal. It is an established formula equally applicable to all patent examiners and not applicable to the majority with the lone exclusion being petitioner Kramer. Petitioner Kramer not only contends that this is true, but the examiners who did the art with him, such as, Leo Picard and Maryann Lestova, were assigned their goals by the same man using the proper formula while he falsified Kramer's record by just writing in 15.4. Note that Leo Picard was excluded from testifying.

The Union man who negotiated the contract could not even testify to explain the formula to the judge. Consequently, the judge just accepted management's version.

The Court of Appeals noted in its June 13, 1988, DECISION that "As far as the merits of Kramer's removal are concerned, the record

contains substantial evidence supporting the charge of unacceptable performance. It reflects that Kramer was warned, both orally and in writing, that his performance was unacceptable, and that he was given substantial opportunity to improve. Kramer does not even argue that the facts do not support the board's finding of unacceptable performance. Rather, he attacks the production goals for the class of art in which he worked as unfair. There is no evidence to support such an allegation. Kramer's supervisors testified that the goals are fair based on the lack of difficulty in Kramer's area. He also testified that Kramer's inability to meet his goal was the result of his inefficiency. This finding is supported by the evidence that almost all of the examiners in Kramer's group met or exceeded their goals. In addition, there is a method of changing the class average for an art, but Kramer never requested such action."

Petitioner Kramer points out to the Court that there is overwhelming evidence that such is not the case. Careful reading of all the exhibits will reveal that Robert Hafer, Kramer's immediate supervisor as well as the Director of Group 330 both have in their files on Kramer that Kramer's complexity is 1.2. To then have them have Hafer come to Court and as sworn testimony state that Kramer's goals are fair (i.e., 15 hours for class 272) when in fact he has in his own files that Kramer's complexity is 1.2 is to commit perjury on the Court. The same perjury applies to Jon Pearson and Rene Tegtmeyer. Petitioner Kramer cannot believe that the Court

is so naive so as to not at least weigh the testimony of both sides. If this is even just initiated it immediately becomes apparent of the above perjury. What is saving the Office's position is that the Court is unknowingly fully (100%) cooperating in this fraud. It is again noted that Kramer cannot have exhibits, or witnesses, and cannot even testify himself. In addition thereto, the testimony of his two admitted witnesses was totally ignored. The Court is going to have to scrutinize this whole case from beginning to end. The Court is so naive that they not only are bilking Kramer, but are being defrauded themselves.

If the Court would only realize that the question is not only whether Kramer made his goal last year (which he didn't according to the Office's calculations) but which he actually did according to his properly calculated goal (as applied to all other examiners except Kramer in the whole patent office) they will discover that not only are they being swayed by perjured testimony, but in addition are being suckered into the position of being the only Court on record to have determined what the goal is for a GS-12 examiner in Kramer's art. They not only don't understand how the goal is to be derived, because they exclude witnesses, prohibit testimony, refuse exhibits, but are by a high Court decision establishing for all time that a GS-12 examiner in Group 330 with a 1.2 complexity factor gets 15 hours per balanced disposal. This is going to be a terrible shock to Leo Picard and Maryann Lestova who each are now receiving

23.6 hours per balanced disposal for class 272. If the Court is not willing to accept that responsibility then they should pay attention, look at the case, and finally come to the conclusion that petitioner Kramer's 272 goal is actually the same as Leo Picard's and Maryann Lestova's and then demand from the Office any reasonable explanation of how Kramer can only have 15 hours and the others 23. The Office cannot explain it BECAUSE IN ROBERT HAFER'S FILE ON KRAMER, AND IN THE GROUP DIRECTOR'S FILE ON KRAMER, HIS COMPLEXITY IS SHOWN IN BLACK AND WHITE AS 1.2. Where did the 1.2 come from? It's testified to by Kramer and Oeschle (who was instrumental in obtaining it for him).

For the Court to state that "He also testified that Kramer's inability to meet his goal was the result of his inefficiency. This finding is supported by the evidence that almost all of the examiners in Kramer's group meet or exceed their goals" is evidence that the Court is being led, and unknowingly defrauded. Kramer is the only examiner in the whole history of the Patent Office who is a GS-12 with an established 1.2 complexity and is working against a 15 hour disposal due to the falsification of his record.

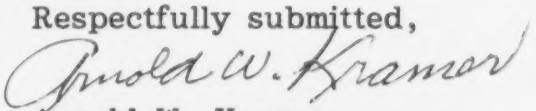
What is lacking in this whole case from the beginning is an impartial hearing officer who accepts all witnesses, exhibits, etc. and then when everyone has had their say makes a decision on the record.

Can you imagine working 60 hours per week for approximately 16 years and having a 1.3 complexity factor, it being noted that it was the highest in the art unit, and rather than work against an approximate 23 hours per balanced disposal, be handicapped instead with a 15 hours per disposal. Note again, this is in the record. The first time the 15 hours was put to paper was by Richard Pinkham falsifying the record. Read the record. Petitioner knows it's easy to take the easy out, but if this case is even minimally checked into, it will find that Kramer's position on this case is the truly honest one.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the issues presented by this Petition.

Respectfully submitted,



Arnold W. Kramer
5500 Buggy Whip Drive,
Centreville, Virginia 22020
Telephone: 703-830-7327

CERTIFICATE OF SERVICE

I hereby certify that one copy of this Petition for Writ of Certiorari was personally delivered to:

Solicitor General
U.S. Department of Justice
10th and Constitution N.W.
Washington, D.C.

this 3rd day of October, 1988.

By Arnold W. Kramer
Arnold W. Kramer

5500 Buggy Whip Drive
Centreville, Virginia 22020

Telephone: 703-830-7327

CERTIFICATE OF SERVICE

I hereby certify that forty copies of this Petition for Writ of Certiorari were personally delivered to:

Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Telephone Number: (202) 479-3000

this 3rd day of October, 1988.

By Arnold W. Kramer
Arnold W. Kramer

5500 Buggy Whip Drive
Centreville, Virginia 22020

Telephone: 703-830-7327

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-3589

ARNOLD W. KRAMER,
Petitioner,

v.

DEPARTMENT OF COMMERCE,
Respondent.

DECIDED: June 13, 1988

Before SMITH, NIES, and MICHEL, Circuit Judges.

PER CURIAM.

DECISION

The final decision of the Merit Systems Protection Board (board), docket No. DC07528710204, affirming the removal of Arnold W. Kramer (Kramer) by the Department of Commerce (agency) for unacceptable performance, is affirmed.

OPINION

Kramer was a patent examiner who was removed for unsatisfactory performance. Kramer argues that the administrative judge (AJ) erred in not permitting all of his witnesses to testify. However, Kramer has not shown that those witnesses who were excluded by the AJ would provide testimony on the issue of Kramer's unsatisfactory performance, which testimony would not duplicate the testimony already before the board. Kramer has not shown an abuse of discretion by the AJ in excluding his witnesses. See Spezzaferro v. Federal Aviation Administration, 807 F.2d 169 (Fed. Cir. 1986).

As far as the merits of Kramer's removal are concerned, the record contains substantial evidence supporting the charge of unacceptable performance. It reflects that Kramer was warned, both orally and in writing, that his performance was unacceptable, and that he was given substantial opportunity to improve. Kramer does not even argue that the facts do not support the board's finding of unacceptable performance. Rather, he attacks the production goals for the class of art in which he worked as unfair. There is no evidence to support such an allegation. Kramer's supervisors testified that the goals are fair based on the lack of difficulty in Kramer's area. He also testified that Kramer's inability to meet his goal was the result of his inefficiency. This finding is supported by the evidence that almost all of the examiners in Kramer's group met or exceeded their goals. In addition, there is a method of changing the class average for an art, but Kramer never requested such action.

We must affirm the board's decision because it is not arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, obtained without procedures required by law, rule, or regulation having been followed, or otherwise not in accordance with law. 5 U.S.C. § 7703-(c) 1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

ARNOLD W. KRAMER, Appellant	)	CASE NUMBER DC07528710204
v.	)	
DEPARTMENT OF COMMERCE, Agency	)	DATE: APR 30, 1987

Arnold W. Kramer, Centreville, Virginia, Pro Se

Jon Pearson, Esquire, Washington, D.C. for the Agency.

BEFORE
Martha J. Lanphear
Administrative Judge

INTRODUCTION

On February 5, 1987, the appellant filed a petition for appeal from the action of the agency removing him, effective January 16, 1987. The appellant was removed from federal employment under the provisions of 5 U.S.C. §7513 and 5 C.F.R., part 752, subpart D. As an employee of the competitive civil service who was not serving a probationary period, he is a covered employee

who is entitled to appeal to the Board. 5 U.S.C. §7513; 5 C.F.R. §752.405.

ANALYSIS AND FINDINGS

An action taken under 5 U.S.C. §7513, may be sustained on appeal only if it is supported by the preponderance of the evidence and is for such cause as will promote the efficiency of the service. 5 U.S.C. §7701(c)(1). As a third element of its case, the agency must also show that the penalty is appropriate. *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981). *See also Fairall v. Veterans Administration,* _ M.S.P.R. __ (1987).

The appellant occupied a position of Patent Examiner, GS-1224-12, with the Patent and Trademark Office, Patent Examining Group 330, Art Unit 331. By letter dated September 22, 1986, the appellant was informed by C. P. Acree, Personnel Officer, that his removal was being proposed because his performance in the critical element for Production Goal Achievement for Fiscal Year (FY) 1986 had been unacceptable. After consideration of, and investigation into, the appellant's responses, R. D. Tegtmeyer, Assistant Commissioner for Patents, issued his decision. In his January 14, 1987 decision, he stated that he found the reason for proposing the appellant's removal to be sustained and to warrant his removal.[1]

---

[1]The action was taken under 5 C.F.R., part 752 (misconduct), rather than 5 C.F.R., part 432 (performance), because the agency is still in negotiation with the union over the performance

The agency submitted records and testimony evidencing the fact that the appellant's performance under the critical element Production Goal Achievement, was only fifty eight percent. The appellant's supervisor, Mr. Robert Hafer, provided information that an employee must achieve eighty percent of his production goal to be satisfactory. He testified that there had been no problem with the appellant meeting his production goal until FY 1986. The appellant then informed him that he had found it necessary for years to work sixty hours per week to meet his production goal and that he was not going to do that any more. In the first quarter of FY 1986, the appellant produced at sixty six percent of goal. The appellant was given an oral warning and opportunity to improve. His performance during the warning period was sixty percent of goal. On May 8, 1986, the appellant was given a written warning and another opportunity to improve. During the second ninety day improvement period, the appellant performed at forty seven percent of goal.

The appellant disputed none of the above evidence. Rather, he argued that his production goals were improper because they do not give him credit for the complexity of his work. The record reflects that the appellant's art (i.e. the types of patent applications on which he does searches) was transferred to the Art Unit 331 when it was formed in 1983. The appellant's art is amusement devices (class 272) and part of

---

plan and thus, Office of Personnel Management approval has not been received.

class 135, canes and crutches. At the time of the transfer, the appellant had class 272 and all of class 135. Subsequently, part of class 135 was assigned to another employee. The production standards or hours per balanced disposition for the appellant's classes were set a number of years prior to the creation of Mr. Hafer's unit. The standard for class 272 is 15.2 hours per balanced disposition and the standard for class 135 is 17.2 hours for a weighted average of 16.2 hours. These hours are the number of hours it should take, on the average, to determine if a device is patentable. The appellant contended that his average should have been nine hours higher.

The appellant presented the testimony of another Patent Examiner who had worked with the appellant before the creation of Art Unit 331. At that time, the appellant worked on classes 272 and 273. The witness testified that he considered those patents complex. The appellant also presented the testimony of a further Patent Examiner, whose art is office machines, that he finds the agency system unfair and that he does not believe that the complexity of his art is properly recognized. The appellant also wanted to present the testimony of more coworkers who would testify that they were unfairly treated by the agency or who would testify about the appellant's problems with the supervisor he had prior to Mr. Hafer. These witnesses would have duplicated the appellant's own credible testimony that in the 1970's when the standards were determined and thereafter, he routinely worked sixty hours per week.

Mr. Hafer testified that the appellant's stan-

dards have remained unchanged since he was the appellant's supervisor. While some classes have different average balanced disposition hours for different subclasses, all of class 135 was given an average of 17.2 hours. Even after the more complex portions of class 135 were assigned to another employee, the subclasses remaining with the appellant continued with the 17.2 average. Mr. Hafer further testified that the other averages have remained essentially the same since the Unit 331 was formed and that generally all of his employees meet their production goals (including the appellant until FY 1986) and about half of them exceed them by enough to receive awards. In Group 330, as a whole, all seventy one Patent Examiners met their production goals in FY 1985, as did all eleven of the Patent Examiners assigned to Art Unit 331. In FY 1986, seventy eight of eighty Patent Examiners in Group 330 and eleven of the twelve Patent Examiners in Art Unit 331 met their goals.

In addition, Mr. Hafer testified there is a mechanism for changing a class average, but that the appellant has never initiated such action. He also had vacancies in other arts due to retirements. He offered to reassign the appellant to some of these other arts, but the appellant never responded to that offer.

In addition to the above, Mr. Hafer testified that the appellant was very inefficient in his use of time. He testified that although employees are required to assist members of the public, the appellant was overly generous and devoted too much time to actually doing searches for them. Also, the average search required the search of

ten to fifteen subclasses. Mr. Hafer testified that the appellant generally searched thirty to forth subclasses. Mr. Tegtmeyer, the deciding official, testified that after reading the appellant's response to the proposal to remove, he had a discussion with Mr. Hafer, the appellant's former supervisor, Mr. Pinkham, and his second level supervisor, Group 330 Director, R. Aegerter. He raised these matters with them and they agreed the reason for the appellant's problems was the inefficient use of his regular forty hour work week. A signed summary of this discussion was prepared. Ag. File, Tab 9. Since 1969, the agency has been providing the appellant written (and oral) notice of what steps he should take to improve his efficiency. *Id.* I find that the preponderance of the evidence indicates that the appellant's standards and goals were reasonable and that his performance was unacceptable as charged. I further find the sustained charge constitutes a proper basis for taking action against the appellant. The sustained charge reflects a situation which is clearly disruptive to the efficiency of the service. *Davis v. Department of the Treasury,* 8 M.S.P.R. 317 (1981).

The appellant stated in his petition for appeal that his removal may have been the result of discrimination on the basis of age or marital status. As the basis for this belief, he stated that he was not aware of any bachelor being promoted above the GS-13 level, although married employees are usually promoted to the GS-14 level. The record identified the appellant's age as over forty. The proponent of a claim of discrimination bears the burden of proof. The initial burden to be met is to establish a prima facie case of discrimination. *Nordell v. Department of Health and Human Services,* 15 M.S.P.R.

37 (1983). To do so, the appellant must show that he is a member of the protected class, was an object of an adverse employment action and that there was a casual relationship between membership in the protected class and that action. *Id.*

The appellant is over forty years of age and apparently is unmarried. He has been the subject of an adverse personnel action. The appellant did not identify those younger or married employees whom he considers similarly situated with him. There is no evidence of anyone in Art Unit 331 having similar performance problems. Both Mr. Hafer and Mr. Tegtmeyer testified that they did not consider the appellant's age or marital status when taking this action. Mr. Tegtmeyer testified that he was not aware of the appellant's marital status. It was apparent that everyone involved in the case was over forty years of age and according to their testimony had worked for the agency for a number of years. I find that the appellant presented no evidence or argument which establishes a casual connection between his age or marital status and the instant removal action. Accordingly, I find that he has failed to make a prima facie showing of discrimination. *Id.*

I turn then to the question of the appropriateness of the penalty imposed in this case. The purpose of the Board's review is to insure that the agency did consider the relevant factors and did set a penalty which is within the limits of reasonableness. The Board does not substitute its judgment for that of the agency and determine what might have been the best penalty in a given case. *Douglas v. Veterans Administration,*

5 M.S.P.R. 280 (1981).

In deciding what action to take, the agency considered the appellant's situation, primarily that, although the appellant had over twenty years of service, he had been given two prior warnings and opportunities to improve. Despite this, no improvement had been noted. Mr. Tegtmeyer testified that he did not find that a demotion would be appropriate as the appellant's production level was not even acceptable at the GS-7 level and that he found no indication that a suspension would improve the situation. I find that the appropriate factors were considered and that the penalty of removal is within the bounds of reasonableness. *Fairall v. Veterans Administration,* __ M.S.P.R. __ (1987).

DECISION

The agency's action removing the appellant is hereby AFFIRMED.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on Jun 4 1987, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§1201.113 and .117. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with the Board's regulations. 5 C.F.R. §§1201.114-.115. The parties should note that they are required to serve any petition for review and any subsequent pleadings on all other parties. It is not necessary to serve the Regional Office. The petition for review must be filed on or before Jun 4 1987 and must set forth objections to the initial decision, supported by reference to applicable laws and regulations, and the record.

If the appellant wishes to contest the Board's final decision on the issue(s) of discrimination raised, administrative review of those issues alone may be obtained by filing a petition for review with the Equal Employment Opportunity Commission (EEOC) within thirty (30) days of the date the initial decision becomes final. 5 U.S.C. §7702(b)(1). The address for EEOC is:

Office of Review and Appeals
Equal Employment Opportunity Commission
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

If the appellant wishes to contest the Board's final decision on the issue(s) of discrimination and has not filed a petition with EEOC, judicial review of all issues may be obtained by filing a petition with an appropriate United States District Court within thirty (30) days of the date the initial decision becomes final. 5 U.S.C. §7703(b)(2). In court cases involving issues of discrimination which were brought before the Board under 5 U.S.C. §7702, appellants have the right to request the court to appoint an attorney to represent them. 42 U.S.C. §2000e-5(f)(1).

If appellant chooses not to contest the Board's final decision on the discrimination issue(s), (s)he may, if the Court has jurisdiction, obtain judicial review of the other issues by filing a petition with:

U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition must be received by the Court within thirty (30) days of the date the initial decision becomes final. 5 U.S.C. §7703(b)(1).

FOR THE BOARD: /s/ Martha J. Lanphear
Martha J. Lanphear
Administrative Judge

APPENDIX C

EXCERPT OF TRIAL TRANSCRIPT BEFORE THE MERIT SYSTEMS PROTECTION BOARD AND EXHIBIT Z BEFORE THE COURT OF APPEALS

ITEM 1

TESTIMONY OF PETITIONER KRAMER [p. 59]

"During this time, I reported many cases to Tony Oeschle, who was a primary examiner, and it was he who I believe told Pinkham of the difficulty of my art, and so I was assigned the highest complexity in Art Unit 334."

TESTIMONY OF WITNESS ANTON O. OECHSLE [p. 115]

"JUDGE LANPHEAR: Would you please give us your name and your position to identify yourself for the record?

MR. OECHSLE: My name is Anton O. Oechsle. That's O-e-c-h-s-l-e. I'm a primary examiner in Group 334. I've been employed in

the Patent Office since 1957.

JUDGE LANPHEAR: Thank you. Mr. Kramer?

MR. KRAMER: OK.

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Mr. Oechsle, the answer to the statement is either yes or no. You heard my testimony that I read concerning you that I reported cases to you and so forth and I think that you were instrumental in getting me the highest complexity factor and so forth in Mr. Pinkham's art unit?

A. Yes.

Q. You heard that statement? Is that true or not, that statement that I put in?

A. I -- to the best of my recollection, yes.

Q. That's true? All right. You're dismissed.

JUDGE LANPHEAR: That's all you want from him? All right."

ITEM 2

TESTIMONY OF PETITIONER KRAMER [pp. 53-54]

"I had the highest complexity factor in Mr. Pinkham's Art Unit 334. It was at least 1.3. I did not, however, get the hours per disposal that this complexity called for. Since at least 1970 I have worked 60 hours per week. This was not paid overtime, but was necessitated by the goals assigned to me.

When the art unit began using sign-in sheets and there was no place to sign in for Saturday and Sunday, I drew a line on the sign-in sheet and put in 10 hours for Saturday and 10 hours for Sunday that I worked. On Monday morning Mr. Pinkham came to see me and ordered me not to do that. Even though you had to sign in and out of the building, I was ordered not to put Saturday and Sunday hours on the Art Unit sign-in sheets. Mr. Pinkham wanted to make it

appear that I was just working 40 hours per week, when in reality he knew I was working at least 60 hours per week. In fact, I not only worked 60 hours per week, including most Saturdays and Sundays, but at the end of practically every quarter I worked all day Saturday and Sunday and all night Sunday until just before the normal office opening, when I would then go home to clean up and change clothes and come back to the office. It was common knowledge in my art unit that I did this.

Instead of getting the hours per balanced disposal that I was entitled to with my complexity factor, Mr. Pinkham gave me a lower hours per balanced disposal so that even though I had the highest complexity factor in his art unit, I was not even assigned at least the average for the group. Mr. Pinkham was passing me off as working a normal 40-hour work week with a very low hours per balanced disposal for a GS-12, and by his calculations, I was not even

meeting my goals. Whereas, the real facts were that I had the highest complexity factor in his art unit, was working 60 hours per week, and was only deficient by not making my quota because instead of getting the hours per balanced disposal I was entitled to as a GS-12 examiner with the highest complexity factor in his art unit, I was being shorted on my assigned hours per balanced disposal.

At the same time I had the highest complexity factor in Mr. Pinkham's Art Unit 334, at least two other examiners were hired and assigned to Art Unit 334; namely, Leo Picard and Mary Ann Stohl, whose married name is now Mary Ann Lastova, who were each assigned GS-12 examining goals of 25.7 hours per balanced disposal for Class 273 and 23.6 hours per balanced disposal for Class 272 by Mr. Pinkham. These examiners then, and still today, have those goals."

ITEM 3

TESTIMONY OF PETITIONER KRAMER [pp. 63-67]

"The above situation raises the questions of why I did not try to transfer or go to higher authority. First of all, my art in 273 was chance devices which also encompasses probability, which is one of the world's great disciplines, and it's based upon mathematics. Insurance companies, industries and so forth rely heavily on this discipline, and I was hired at the Patent Office originally as a GS-7 rather than as a GS-5 because of my score on the graduate record examination in mathematics taken at the end of college. In other words, I had an appreciation of the art.

As to going to higher authority, the following is noted:

Another examiner, Henry Layton, who also worked in Group 330 in an office across the hall from me, was having a personality conflict with

his new Supervisory Primary Examiner. He had had no trouble with his previous Supervisory Examiner, who, due to a reorganization, had left the office on a RIF. The old SPE was Richard Gaudet. The new SPE was Robert Mitchell, who came to Group 330 from Classification. Due to the personality conflict, Mr. Layton requesting reporting to another Primary Examiner rather than to Mitchell, but this request was refused, as was his request to transfer to somewhere else in the Office. Mr. Mitchell decided to recommend Mr. Layton's firing. Such firings are decided by higher authority, and as a result the firing decision went to the Commissioner's Office, where Rene Tegtmeyer, the Assistant Commissioner for Patents, decided to fire Mr. Layton. Mr. Layton believed that he was protected against such adverse actions by Personnel Bulletin 792-2, sections 4, 7 and 8, while having psychological evaluation and treatment. Nevertheless, Mr. Tegtmeyer fired Mr. Layton. Conse-

quently, an appeal was filed by Mr. Layton over the firing, and the appeal has been going on for over eight years, and even though decisions favorable to Mr. Layton have been handed down on numerous occasions, the case has still not been settled.

As to going to the Commissioner himself, the following is noted:

When Gerald J. Mossinghoff was Commissioner and has been Commissioner for approximately nine months, he went to Group 330 to make a speech concerning getting an increased budget, hiring new people, automating and so forth, and that the outlook was that the Office was in a state of rehabilitation with a glowing future. At the end of this talk, he asked for questions. And Barry Shay, a Primary Examiner in Group 330, who was a very conscientious and respected examiner, pointed out to Mossinghoff that he was bothered because since the Office had taken the classification of foreign patents

away from the examiners, that 50 percent of the foreign patents classified by classification in his art didn't even belong in the class, and that of the other 50 percent which did belong in the class that half of them were classified in the wrong subclasses. In other words, 75 percent of the foreign references were being misclassified, and it bothered him. Mossinghoff gave Mr. Shay a quick-fix answer to the effect that a survey had been made and that the Office was doing it as good as it had been done by the examiners and so would continue to do so, and went on to the next questions. If Mr. Shay had been classifying the foreign references in his art, there would have been a zero percent of error. Instead, he was faced with 75 percent of the foreign references being misclassified by classification. While Mossinghoff's reply may have made it with the uninformed, he apparently didn't realize that he was talking to the examiners themselves. The survey he speaks of

has to be, at best, inaccurate. The examiners are charged with classifying the patents they issue by class and subclass, and charged with classifying any and all cross-references which pertain thereto. They are further charged with classifying the issued patents by international classification. To then say that they are unable to or have a 75 percent deficiency in such classification as revealed by Mossinghoff's so-called survey as to classifying the foreign patents, is to either say that they know what they are doing on the one hand, but not when classifying the foreign patents, or else it also pertains to 75 percent error in the U.S. and international classifications, too, but that that is all right with the Office.

The real reason for the above 75 percent of the foreign references being misclassified by classification is believed to be because at the meeting where the question was raised as to how to increase production, a group director sup-

posedly observed that if the classification of foreign references was taken away from the examiners, the time they devoted thereto could be used for examining time, which should then help production goals of the Office. The so-called survey is believed to support this outlook. Following the same faulty reasoning, if the classification of the U.S. patents, cross-references and international classification were left to classification rather than to the examiners, then production should increase even more. The fact that 75 percent of the foreign references are being misclassified by classification for the last several years appears to be of no concern whatsoever to management. On the other hand, the examiner's position is that this borders on the criminal and only further burdens them because the art is not where it is supposed to be. In light of the above, the average knowledgeable, older examiner, aware of the problem, wonders when the last patent with any presumption of

validity whatsoever left the office. It borders on the criminal, and if it wartime, it would be looked upon as a fifth column within the system attempting to destroy the credibility and end product of the office. It is noted that when this was pointed out to Mossinghoff, that his either doesn't-give-a-damn attitude or being misinformed as to its impact on the integrity of the system which he was head of, together with his working to extend the pharmaceutical industry's protection, taken together with his leaving the Patent Office to become head of this pharmaceutical organization, smacks to many examiners as a seemingly conflict of interest.

Consequently, going to higher authority, whether to the group director of Group 330 or even to the Commissioner's Office, would appear to be a futile effort."

CERTIFICATE OF SERVICE

I hereby certify that three copies of Appendix C (excerpt of trial transcript before the Merit Systems Protection Board), which was inadvertently left out of the Petition for Writ of Certiorari, was personally delivered to:

Solicitor General
U.S. Department of Justice
10th and Constitution N.W.
Washington, D.C.

this 4th Day of October, 1988.

By Arnold W. Kramer
Arnold W. Kramer

5500 Buggy Whip Drive
Centreville, Virginia 22020

Telephone: 703-830-7327

CERTIFICATE OF SERVICE

I hereby certify that forty copies of Appendix C (excerpt of trial transcript before the Merit Systems Protection Board), which was inadvertently left out of the Petition for Writ of Certiorari, was personally delivered to:

Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Telephone Number: (202) 479-3000

this 4th Day of October, 1988.

By Arnold W. Kramer
Arnold W. Kramer

5500 Buggy Whip Drive
Centreville, Virginia 22020

Telephone: 703-830-7327